In the Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1924

CHEUNG SUM SHEE, CHEUNG WAI MUN, FONG GOON HONG, DER HING FONG, WONG BEN JUNG, HONG CHOW JUNG, MOK LING PARK, NG SHEE and WONG SHEE, On Habeas Corpus,
Appellants and Petitioners,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,
Appellee and Respondent.

No. 769

CERTIFICATION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

Statement of Facts

This action came to the Circuit Court of Appeals for the Ninth Circuit upon appeal from the judg-

ment of the United States District Court for the Northern District of California, Southern Division thereof, Second Division, in favor of John D. Nagle, Commissioner of Immigration for the Port of San Francisco, respondent in the District Court, and against Cheung Sum Shee, Cheung Wai Mun, Fong Goon Hong, Der Hing Fong, Wong Ben Jung, Hong Chow Jung, Mok Ling Park, Ng Shee and Wong Shee, the petitioners in the District Court and the appellants before the Court of Appeals for the Ninth Circuit.

The action was to relieve the petitioners of the restraint imposed by the appellee. The petition for habeas corpus alleges that the appellants arrived at the Port of San Francisco on the steamship President Lincoln on July 11, 1924, and sought the right of permanent admission into the United States, they being respectively the wives or minor children of resident Chinese merchants lawfully domiciled within the United States, as in each instance specifically set forth in the petition. They were awaiting a setting of their cases for trial by the Commissioner of Immigration, and had the necessary witnesses all in readiness to appear for examination to establish their right of admission into the United States, under the terms of the treaties between the United States and China, and the Chinese Exclusion and Restriction Acts. The Commissioner did not accord the contemplated hearing, but caused each applicant to be examined in

his own or her own case before a Board of Special Inquiry, which thereupon denied each of them admission into the United States under the provisions of the Immigration Act of 1924 effective July 1, 1924. An appeal was at once taken to the Secretary of Labor, where suitable protests and briefs were filed, after which the Secretary of Labor dismissed the appeal in each instance and affirmed the excluding decision. The excluding decisions were substantially the same in each instance, and by way of illustration that of Cheung Sum Shee and her infant son Cheung Wai Mun is cited, the ground for the Secretary's ruling being as follows:

> "Neither the mercantile status of the husband and father, nor the applicant's relation to him, has been investigated for the reason that even if it were conceded that both these elements exist the applicants would be inadmissible as a matter of law. This is made necessary because of the inhibition against their coming to the United States as found in paragraph (c) of section 13 and that portion of section 5 which reads as follows: 'An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.'"

The petition alleges that there has been a misconstruction and a mistaken and wrongful interpretation of the Immigration Act of 1924, the effect of which

has been to violate the rights of appellants as specifically recognized by the act itself, and said incorrect statutory construction violates and disregards the lawful rights of petitioners and their respective husbands and fathers. The petition was supplementally amended by filing the original immigration records in the case of each of the detained, and as so amended the appellee interposed a general demurrer, which was sustained by the lower court on October 25, 1924, which thereupon refused to issue the writ of habeas corpus, as prayed for, and denied the petition, after which the case was immediately appealed and docketed in the Court of Appeals for the Ninth Circuit.

The same legal propositions upon behalf of other such applicants for admission were presented before the United States District Court for the Western District of Washington at Seattle, which were decided favorably to the petitioners upon September 23, 1924: In re *Goon Dip* et al. on habeas corpus, 1 Fed. (2) 811.

Later in the case of *Chin Hem Shu* (December 11, 1924), Judge Lowell of Massachusetts decided: "I don't think this new law overrules the law that the merchants and their families can enter, and I shall follow Judge Neterer on that." The case was that of a merchant's minor son.

The Certified Question

Therefore the Circuit Court of Appeals for the Ninth Circuit certified the following question to the Supreme Court of the United States:

"Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?"

As will be perceived even in the event of an answer favorable to the petitioners the questions of mercantile status and relationship remain to be passed upon by the lower court.

General Preliminary Observations

The status of the Chinese in America may here be properly adverted to as a means of calling the attention of this Honorable Court in a general way to certain facts.

When the civilized nations of the world awoke China from her centuries of isolation with a request that she enter into commercial intercourse with the nations of what was to her, the outside world, she complied, and in 1844 freely granted to the United States such a treaty. One of the first rights granted (Article III) to our *citizens* was *to reside with their families and trade there,* referring to the first five open

ports of China, and in the treaty of 1858 (Article XIV) the right *to reside with their families and trade there* was extended to all subsequently opened ports and to all other ports and places in China when and as they may be opened to commerce and residence. These stipulations were all one way because up to then the Chinese people had not traveled abroad. In the Burlingame Treaty of 1868 Article II safeguards the previously granted right to our citizens *to reside with their families and trade there,* and by Article VI the rights of American citizens *visiting or residing in China* were enlarged as to *travel or residence* by the favored nation clause, *and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence,* and then followed the favored nation clause. Chinese came to our shores in response to treaty invitations (Article V) and engaged in trade and commerce, and in completing our transcontinental railways, in developing our mines and in various ways hastened and materially advanced the development of our western country; some brought their families with them, others sent for them later. Financial depression sweeping over the country finally came to the western slope and competition and rivalry commenced which resulted in the treaty of 1880 by which China consented to the stopping by statute of the immigration of Chinese labor. Article I provided: *"The limitation or suspension*

shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations." Article II provided: *"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, shall be allowed to go and come of their own free will and accord."* Then followed the favored nation clause, while Article III extended this clause to the Chinese *either permanently or temporarily residing in the territory of the United States.*

We have shown that the United States, one of the leading civilized and Christianized nations in the world, asked the right of its citizens to reside with their families in China and trade there, and this was granted in specific terms by China, a non-Christian nation, and reciprocally, without enumeration, the same rights were given to Chinese citizens coming to, or residing within, the United States. This was solely modified to prevent the coming of Chinese labor. Could it be possible, bearing in mind the unity of the family, identity of person and domicile, between husband and wife, parents and children, that the right of a Chinese merchant to reside with his family in this country was withheld by treaty through want of specific reiteration?

We will show hereafter that when this matter was presented to the court and finally to the Supreme Court, it was held that the treaty rights of the Chinese

were not restricted or encroached upon; that the right of merchants to reside here with their families—i. e., their wives and minor children—was upheld, and that treaty interpretation has been undisputed and upheld until the beginning of the present controversy. The right of entry and residence of Chinese within the United States rests upon treaties and the statutes in furtherance of said treaty stipulations. The General Immigration Laws in specific terms were not to repeal, alter or amend the Chinese Exclusion Laws. The effectiveness of the Chinese Exclusion Laws is amply demonstrated by the census reports, as the following will show:

POPULATION OF CHINESE PERSONS

According to the United States Census Returns for 1890 to 1920, inclusive, as referring to San Francisco, California, and the United States.

Year	San Francisco	California	United States
1890	25,833	72,472	107,475
1900	13,954	45,753	89,863
1910	10,582	36,248	71,531
1920	7,744	28,812	61,639

That the Chinese have not constituted a live political question for many years is shown in the message of President Roosevelt of December 5, 1905 (Abridgement, 1905, Vol. I, pages 46-47):

> "The questions arising in connection with Chinese immigration stand by themselves. * * * At present their entrance is prohibited by laws amply

adequate to accomplish this purpose. These laws have been, are being, and will be, thoroughly enforced. The violations of them are so few in number as to be infinitesimal and can be entirely disregarded. There is no serious proposal to alter the immigration law as regards the Chinese laborer, skilled or unskilled, and there is no excuse for any man feeling or affecting to feel the slightest alarm on the subject. * * * As a people we have talked much of the open door in China, and we expect, and quite rightly intend to insist upon, justice being shown us by the Chinese. But we can not expect to receive equity unless we do equity. We can not ask the Chinese to do to us what we are unwilling to do to them."

The quota laws of 1921-1922 were devised to stop inundation by post-war European immigration. The Chinese, whose admission was regulated by treaty, were exempt from its operation. The new quota law of 1924 likewise exempts those coming for purposes of trade under existing treaties of commerce and navigation. All the treaties with China are conceded to be of that character. The committee in presenting this law stated that this phrase was broad enough to take care of all the clauses of all of our immigration treaties. In view of this fact it was believed by the Chinese that they were completely exempted from the present quota act, as indeed they had been from the earlier act, it being borne in mind that the present legislation in this regard was but in execution of prior existing treaty stipulations.

The denial by the immigration authorities of the

right of these wives and minor children to enter the United States comes as a shock to the sensibilities of enlightened and Christian people no less than to the Chinese residents of this country, and the parties to this suit. The foundation of all Christian society and civilization is respect for the unity of family, identity of person and domicile, of husband and wife, parents and children. The fact that one of the leading civilized and Christian nations should be put in the light of entering such a decree against harmless, useful and law-abiding men, women and children shocks our sensibilities, and a decree that violates the rights which a pagan nation gave to our citizens to reside with their families in China is most repellant to our conscience, and violative in the highest and most extreme sense of solemn treaty rights long acknowledged and upheld without harmful result to our country; and this, in spite of the fact that the statute in question professes but to execute these existing treaty stipulations, and it, therefore, seems that the executive decree in these cases is based upon an incorrect construction of this act, the effect of which is to infringe the treaty and statutory rights specifically recognized by the act itself. The contention which we make has been upheld by District Judge Neterer of Seattle and District Judge Lowell of Boston, and has been denied alone by District Judge Kerrigan of San Francisco in these cases, 2 F. (2d) 995.

The Issue

Stated in a few words the issue in this case is whether or not, now that the Immigration Act of 1924 is in effect, the wives and minor children of Chinese merchants domiciled in the United States are to be allowed entry to join husbands and fathers. If the answer be yes, the petitioners must be discharged, subject to questions indicated of status and relationship. If otherwise, then families must continue separate or the fathers must give up their business in our country and return to a country from which they have long been separated and take up life in a new way. To many the answer to the riddle is to all intents a matter of life and death.

We must, therefore, approach the study of this proposition with broad and liberal minds, not forgetful of the fact that the Chinese may readapt the familiar Shakespearean quotation to apply to themselves, thusly:

> "Hath not a Chinaman hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian? If you prick us do we not bleed?"

We are not considering *inanimate* objects, but *creatures* of flesh and blood, partakers of a common humanity with us. We do not believe without

clear proof that Congress forgot all this and with deliberation enacted a law calculated to sever the very heartstrings of men and women and little children, or to uproot with violent hands the legitimate surroundings and ambitions of a lifetime of many good men.

Treaties and Statutory Provisions Affecting Exclusion of Chinese Involved in This Case

The first treaty between the United States and China was that of 1844 of Peace, Amity and Commerce (Malloy's Treaties, Vol. 1, p. 196). Article III of this treaty gives citizens of the United States the right to frequent certain treaty ports and to reside with their families and trade there. Article XXXIV contemplates the possibility of modifications to be treated of amicably at the expiration of twelve years from the date of the convention. It will be noted, therefore, that this treaty was one of commerce, and the following one was like it in this respect.

The next was that of 1858, entered into for the same purposes, and which we may pass over (Malloy's Treaties, Vol. 1, p. 211).

The treaty following was what is known as the Burlingame Treaty of 1868 (Malloy's Treaties, Vol. 1, p. 234). This treaty is to be treated as if it were in effect a continuation of the Treaty of 1858, for in the first paragraph it speaks of "circumstances" that "have arisen showing the necessity of additional arti-

cles thereto." We quote first from Article V the following:

> "The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade or as permanent residents." * * *
>
> "Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

Then came the treaty of 1880 (Malloy's Treaties, Vol. 1, p. 237), the parts essential to this discussion being as follows:

> "Article I. Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China

agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

In 1894, came the Convention Regulating Chinese Immigration (Malloy's Treaties, Vol. 1, p. 241). From this we quote as pertinent:

"And whereas the two Governments desire to co-operate in prohibiting such immigration, and to strengthen in other ways the bonds of friendship between the two countries: * * *

Article I. "The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions hereinafter specified, of Chinese laborers to the United States shall be absolutely prohibited. * * *

Article III. "The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart."

In 1903 the United States entered into a "Treaty as to Commercial Relations" (Malloy's Treaties, Vol. 1, p. 261). We quote:

"The United States of America and His Majesty the Emperor of China, being animated by an earnest desire to extend further the commercial relations between them * * * whereby the Chinese Government agreed to negotiate the amendments deemed necessary by the foreign Governments to the treaties of commerce and navigation and other subjects concerning commercial relations, with the object of facilitating them," * * *

Article XVII. "It is agreed between the High Contracting Parties hereto that all the provisions of the several treaties between the United States and China which were in force on the first day of January A. D. 1900, are continued in full force and effect except in so far as they are modified by the present Treaty or other treaties to which the United States is a party.

The present Treaty shall remain in force for a period of ten years beginning with the date of the exchange of ratifications and until a revision is effected as hereinafter provided."

These treaties serve to fix the rights of merchants and laborers coming to and residing in the United States except in so far as affected by legislation within the United States. We have referred to the treaties between the United States and China thus extensively for the purpose of showing how thoroughly and repeatedly the right of Chinese merchants to enter this country had been recognized by the treaty making branch of our Government. First the right of Americans to reside in certain Chinese ports was granted, followed by the Burlingame treaty putting Chinese merchants upon a reciprocal footing, and this in nowise affected by the Treaty of 1880. (See opinion of Justice Field in *Low Yam Chow*, 13 Fed. 605, and Justice McKenna in re *Lee Kan* vs. *United States* in 62 Fed. 914, approved by the Supreme Court in *Lau Ow Bew*, 144 U. S. 47.)

The pertinent legislation which may be regarded as having any force we now include. By the Act of May 6, 1882 (22 Stat. L., 58), as amended and added to by the Act of July 5, 1884 (23 Stat. L., 115) it is provided that:

> "Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this Act, and until the expiration of ten

years next after the passage of this Act, the coming of Chinese laborers to the United States be, and the same is hereby suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States." * * *

Sec. 6. "That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate, shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States.

"If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant,' hucksters, peddlers, or those engaged in taking, drying,

or otherwise preserving shell or other fish for home consumption or exportation.

"Sec. 13. That this act shall not apply to diplomatic and other officers of the Chinese or other Governments traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons. * * * *

"Sec. 14. That hereafter no State court or courts of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

The Act of September 13, 1888 (25 Stat. L., 476), relating particularly to Chinese laborers, contains in Section 7 this provision:

"Sec. 8. That the Secretary of Labor shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles."

By the Act of May 5, 1892 (27 Stat. L., 25), it was provided that:

"All laws now in force prohibiting and regulating the coming into this country of Chinese

persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act."

By the Act of November 3, 1893 (28 Stat. L., 7), it was provided in Section 2 as follows:

"The term 'merchant', as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

By the Act of April 29, 1902 (32 Stat. L., part 1, 176), as amended and re-enacted by Section 5 of the Deficiency Act of April 27, 1904 (33 Stat. L., 394-428), it is provided as follows:

"All laws in force on the twenty-ninth day of April, one thousand nine hundred and two, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the act entitled 'An act to prohibit the coming of Chinese laborers into the United States,' approved September thirteenth, one thousand eight hundred and eighty-eight, be, and the same are hereby, re-enacted, extended, and continued, without modification, limitation, or condition." * * *

Some of the foregoing references are given because

it will be necessary to refer to them in argument and not because of direct application to the questions involved in this case.

The Immigration Acts

Under this heading the first Act to which it becomes necessary for us to call attention is that regulating immigration of aliens to, and the residence of aliens in, the United States (February 5, 1917; 39 Stat. L., 874).

In Section 3 are enumerated the classes of aliens, specially referring among others to Asiatics, which shall be excluded from admission to the United States and providing among other things that "no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States."

It is added:

> "The provision next foregoing, however, shall not apply to persons of the following status or occupations: Government officers, ministers or religious teachers, missionaries, lawyers, physicians, chemists, civil engineers, teachers, students, authors, artists, merchants, and travellers for curiosity or pleasure, nor to their legal wives or their children under sixteen years of age who shall accompany them or who subsequently may apply for admission to the United States." * * *

In Section 38 it is provided:

> "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons

of Chinese descent, except as provided in section nineteen hereof." (Section 19, referred to, does not affect questions involved in this case.)

The subject matter contained in this Section 38 was considered by this Court in the cases of *U. S.* vs. *Woo Jan* (245 U. S., 552; 38 Sup. Ct., 207; 62 L. Ed., 466), *White* vs. *Chin Fong* (253 U. S., 113; 40 Sup Ct., 449), and in *Ng Fung Ho et al.* vs. *White* (259 U. S., 276, 279; 42 Sup. Ct., 492, 493).

There followed the "Quota-Act" affecting immigration, approved May 19, 1921 (42 Stat. L., 7), as amended May 11, 1922 (42 Stat. L., 540), containing nothing, however, directly affecting the questions involved in this case, except that it provides in Section 4 that its provisions are in addition to and not in substitution for the provisions of the immigration law. It is important to observe, however, that this quota law in Section 2, Subdivision 5, exempts from its operation "aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration." The Chinese were exempted because their coming was regulated by treaty; the agreements had reference to the so-called Gentlemen's Agreement with the Japanese.

We come now to the Immigration Act of 1924, approved May 26, 1924, being Public Law No. 139 of the Sixty-eighth Congress, and for convenience at this point we include all pertinent sections as follows:

"Definition of 'Immigrant'

"Sec. 3. When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Non-Quota Immigrants

"Sec. 4. When used in this Act the term 'non-quota immigrant' means,

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South

America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him.

(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or

(e) An immigrant who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn."

"Quota Immigrants

"Sec. 5. When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

"Preferences Within Quotas

"Sec. 6. (a) In the issuance of immigration visas to quota immigrants preference shall be given—

(1) To a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife, of a citizen of the United States who is 21 years of age or over;" * * *

"Non-Quota Immigration Visas

"Sec. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant."

"Exclusion From United States

"Sec. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be

admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3.

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such admissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

(e) No quota immigrant shall be admitted under subdivision (d) if the entire number of immigration visas which may be issued to quota immigrants of the same nationality for the fiscal year has already been issued. If such entire number of immigration visas has not been issued, then the Secretary of State, upon the admission of a quota immigrant under subdivision (d), shall reduce by one the number of immigration visas which may be issued to quota immigrants of the same nationality during the fiscal year in which such immigrant is admitted; but if the Secretary of State finds that it will not be practicable to make such reduction before the end of such fiscal year, then such immigrant shall not be admitted.

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under Section 16."

"Maintenance of Exempt Status.

"Sec. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section (3), or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

"Act to Be In Addition to Immigration Laws.

"Sec. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

"General Definitions.

"Sec. 28. As used in this Act, * * *

(b) The term 'alien' includes any individual not a native-born or naturalized citizen of the United States, but this definition shall not be held to include Indians of the United States not taxed, nor citizens of the islands under the jurisdiction of the United States.

(c) The term 'ineligible to citizenship,' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under Section 2169 of the Revised Statutes, or under Section 14 of the Act entitled 'An Act to execute certain treaty stipulations relating to Chinese', approved May 6, 1882, or under section 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections; * * *

(g) The term 'immigration laws' includes such Act (Act of February 5, 1917), this Act, and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, or expulsion of aliens."

Congressional Understanding as to Aliens Ineligible to Citizenship Under the Immigration Act of 1924.

As we have under consideration the question of the proper interpretation of the present act so far as Chinese are concerned, we recall the old Blackstonean maxim that in the interpretation of statutes one should bear in mind the old law, the mischief and the remedy. With this in view we can with advantage refer to the reports of the Committee on Immigration and Naturalization of the House of Representatives, the first report being No. 176, Sixty-eighth Congress, First Session. This covers the first House Bill in which a number of changes were afterwards made with the result that it was largely recast, but, nevertheless, is pertinent to our discussion upon the points in issue.

After reciting the necessity for immediate and urgent need of immigration legislation by reason of the fact that the Act of 1921, known as "The Three Percent Law," was about to expire, and there was fear, in the absence of further legislation, that a movement to our shores of the largest immigration of peoples in the history of the world, might be expected to begin July 1, 1924, and that the exclusion clauses of the Act of February, 1917, would be powerless to stem the tide, a bill was prepared which, among other things, preserved the basic immigration act of 1917, changed the quota base of the Act of 1921 from the census of 1910 to the census of 1890, reducing the

percentage from 3 to 2, and met "the situation with reference to the admission of persons ineligible to citizenship." The report under the heading of "Persons Ineligible to Citizenship" contains the following:

> "The provisions of the bill in reference to the admission and non-admission of 'persons ineligible to citizenship' are as follows:
>
> (b) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (g) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

The subdivisions referred to are as follows:

> "(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> (d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university.
>
> (g) An immigrant who is a bona fide student over 18 years of age and who seeks to enter the United States solely for the purpose of study at an accredited college, academy, seminary, or university, particularly designated by him and approved by the Secretary."

The report on page 14 continues:

> "The commercial treaty between the United States and Japan of 1911 supersedes the treaty of 1894, and contains the following provisions:
>
> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential purposes and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

The report refers to the fact that nationals of Oriental countries are not entitled to be naturalized and, without any reference whatever to the Chinese situation, further discusses the commercial treaty between the United States and Japan of 1911, and the so-called "Gentlemen's Agreement."

It is thus noted that Chinese were not specifically mentioned or discussed in the preparation of this report or of the bill to which it relates, nor does there seem, at this point, to have been any intention on the part of the committee that any provision touching Chinese exclusion should be enacted, the difficulty in regard to Japan being the only matter under discussion.

Later, the first bill (H. R. No. 6540) was reintroduced with amendments largely because of suggestions

coming from the Secretary of State, the reintroduced bill being known as H. R. No. 7995; the report accompanying it being No. 350.

The purposes of the bill were stated essentially as on the former occasion, the immigration law of 1917 again treated as the basic immigration law, and the reasons for immediate action were stated in practically identical language. Pursuant to the suggestion of Secretary Hughes, however, "for the protection of treaties of the United States with other countries," the following additional exemption clause was added to Section 3:

> "(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Commenting upon this it was said that

> "Your committee feels that this additional exemption does not pass that control (over immigration) from Congress, and feels also that it is broad enough to take care of all the clauses of all our commercial treaties, including that with Japan, which has been specifically mentioned in the exchange of letters between the State Department and the Committee."

The committee reported at some length the provisions of the Treaty of Commerce and Navigation between the United States and Japan concluded in 1911 and the so-called "Gentlemen's Agreement," and

again and in like language considers who may not be naturalized and assumes that (page 6 of Report)

> "The modifications now made in the bill will remove the Secretary's objections, which were apparently founded on the fact that Bill H. R. 6540 omitted to make exception for those coming solely for trade purposes."

It states that

> "As a matter of fact, the Department of State advises that no immigration treaties have been made by the United States since those made with China in 1880 and 1894, the latter of which was terminated in 1904."

Thereafter the Report discusses at great length the relations between Japan and the United States including the rapid increase of Japanese in the United States, notwithstanding the "Gentlemen's Agreement," and states that (Report, p. 9)

> "It would appear from these facts that the United States has been grossly lax in permitting the increase in her territory of an unassimilable population ineligible for citizenship, and that she has deferred too long the adoption of remedial measures."

At no point is the suggestion made that it is desirable or intended to change the Chinese exclusion laws. The nearest approach is on page 6 of the Report, where it is said that

> "All must agree that nothing can be gained by permitting to be built up in the United States colo-

nies of those who cannot under the law become naturalized citizens, and must therefore owe allegiance to another government."

Of course, it could scarcely be contended that this remark could have reference to Chinese merchants and their families.

It seems clear from this review that notwithstanding the general language of the bill, and notwithstanding references in it to aliens ineligible to citizenship and unassimilable, the purpose in the Committee's mind was to put an end to the coming of the Japanese, and this purpose was so determined that in the beginning no saving clause whatever was inserted, and the saving clause finally placed in the bill was only put there to enable Japanese in business, particularly provided for in the Treaty of 1911, to come under the barriers which had been erected against their national associates.

Judicial Construction and Interpretation of Chinese Immigration Laws

With this condition as to the treaties and laws governing the right to entry into the United States of Chinese merchants, their wives and children, and evidence of Congressional intent, extending only to others than Chinese, the Department of Labor has excluded from such entry in this case the wives and children of Chinese merchants residing in the United

States and who have appeared at our ports of entry since July 1, 1924.

It will be noted that by treaty and by law only Chinese merchants (not expressly including their wives and children) were entitled to admission in express terms until recognition of the right of wives and children in Section 3 of the Immigration Act of 1917, and that entry was refused by the Department of Labor in these cases when the subject matter first received special treatment. Yet up to the present time their right to admission has not been successfully challenged. Although not enumerated, the right of admission as having the status of the merchant himself has been continuously recognized since the decision of Judge Deady *in re Chung Toy Ho,* 42 Federal, 398. He refers to the passage of the Act of 1884, professedly to execute the Treaty of 1880, permitting a Chinese merchant to bring his body and household servants into the country where they shall "be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens of the most favored nation," and continues:

> "Chinese women are not teachers, students, or merchants; and therefore they cannot, as such, obtain the certificate necessary to show they belong to the favored class. But, as the wives and children of 'teachers, students and merchants,' they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact. * * *
>
> "It is impossible to believe that parties to this

treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children, particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn into the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France."

In the case of the *United States* vs. *Gue Lim,* 83 Federal, 136, Hanford, District Judge, held that

"Looking now to the reasons for and against the rule contended for by the officers of the government, I agree with Judge Deady that the admission of Chinese merchants with their families is not to be regarded as a mischief which the Chinese restriction and exclusion acts were intended to remedy."

The latter case was appealed to the Supreme Court of the United States (176 U. S., 459; 44 Law. Ed., 544) and in the course of its opinion the Supreme Court said:

"The question is, what did Congress mean by the Act of 1884? Some light upon that question can be derived from the treaty of 1880, which must be read in connection with it. By Article II of the treaty,

Chinese subjects proceeding to the United States, either as teachers, students, merchants, or from curiosity, together with their body and household servants, were to be allowed to go and come of their own free will and accord, and were to be 'accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.'

"It was for this purpose of carrying these treaty stipulations into effect that the Act of 1882 (22 Stat. L., 58, Chap. 126), and the amended act of 1884 (23 Stat. L., 115, Chap. 220) were passed."

"It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty; * * * The act was never meant to establish the result of permanently excluding the wife under the circumstances of this case, and we think that, properly and reasonably construed, it does not do so. If we hold that she is entitled to come in as the wife, because the true construction of the treaty and act permits it, there is no provision which makes the certificate the only proof of the fact that she is such wife. In the case of the minor children the same result must follow as in that of the wife."

A most illuminating comment upon the decision in the *Gue Lim* case is made by Mr. Justice McReynolds, speaking for the court in *Yee Won* vs. *White,* 256 U. S., 399, wherein he says that the *Gue Lim* case turned on the true meaning of section 6 of the Act of July 5, 1884, as to requirement of certificate as to mer-

cantile character, and his conclusion was "that the section should not be construed to exclude their wives, since this would obstruct the plain purpose of the treaty of 1880, to permit merchants freely to come and go."

Equally an interpretation which would exclude the wives of all tourists or persons (aliens) visiting the United States for business or pleasure or entering for trade under an existing treaty of commerce and navigation, at any rate unless within a quota, is certainly, we submit, to be avoided.

The Court of Appeals for the Ninth Circuit, in *Tsoi Sim* vs. *U. S.* (116 Fed., 920), decided on May 5, 1902, following the Gue Lim decision, states in part:

> "These cases recognize the principle that the domicile of the parent is the domicile of the child and that the status of the wife is fixed by the status of the husband. That the domicile of the husband is the domicile of the wife is well settled; it was so expressly held in *Anderson* vs. *Watt*, 138 U. S., pp. 694, 706; 11 Supreme Ct., 449; 34 Law. Ed., 1078."

Should Broad or Narrow Construction Be Given to Recent Legislation?

Approaching the consideration of the true construction to be given to the law as laid down by Congress, we have a right to inquire broadly what has been the interpretation of the laws governing Chinese immigration when they have been called into question in

the courts. We are justified in doing this because Congress in passing its legislation had a right to expect, in the absence of express direction on its part to the contrary, that the court would approach the study of the new law from the general standpoint which had prevailed before the recent enactments. We can, as it happens, confidently assert that the legal approach has been in favor of the broad rather than the narrow treatment of the whole subject.

Let us enumerate some of the classes of cases in which the attitude of the courts has been entirely manifest:

1. In the case of *Tsoi Sim* vs. *U. S.,* 116 Federal, 920, the Circuit Court of Appeals refused to expel from this country a Chinese woman who had failed to register during the registration period under the Chinese Exclusion Act of 1923, and who, after the expiration of the legal period, had married an American citizen. The Court held that it would be unreasonable, unjust and oppressive to give the statute literal application. There was no clause of the Exclusion Act specifically preventing the deportation of this Chinese woman who had failed to register as she did not belong to what is known as the "exempt classes."

2. In the case of *Lau Ow Bew* vs. *U. S.,* 144 U. S., 47, the Supreme Court permitted re-entry into this country of a Chinese merchant who had been

residing and carrying on business here and who had gone abroad for a temporary visit. This, although the Act of 1884 (23 Stat. L., 115) had specifically provided that "every Chinese person, other than a laborer * * * who shall be about to come to the United States," must obtain a specially described certificate from the Chinese government and that the certificate in question should be the "sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States." The Court in declining under such circumstances to consider the certificate a requisite in the case of the merchant established in this country, said:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd construction."

It held, therefore, that such Chinaman should be readmitted upon the basis of evidence showing that he had previously lived here and without producing the certificate specified by said section as required of "every Chinese person other than a laborer."

3. Section 2 of the Chinese Exclusion Act of November 3, 1893 (28 Stat. L., 7) provided in terms that a merchant for the purposes of the exclusion laws must be "a person engaged in the buying and selling of merchandise at a fixed place of business, which business is conducted in his name," but the lower

court and finally the Supreme Court of the United States held that it was not necessary for the merchant to conduct the business in his own name, but merely that his name shall appear in the partnership certificate and that he must have a real interest in the business; that it would be unreasonable in the light of history and the purposes of the legislation, notwithstanding the apparently plain language of the statute, to impute to Congress the intention to change the usual Chinese custom of doing business under a firm designation, especially as the purposes of the law could not be furthered by so doing (*Lee Kan* vs. *U. S.*, 62 Fed., 914; *Tom Hong* vs. *U. S.*, 193 U. S., 517).

4. We have already alluded to the cases of *Chung Toy Ho*, 42 Fed., 398, and *Gue Lim* vs. *U. S.*, 176 U. S., 459, showing that although not at all included as specified under the treaty or law, the wives and children of merchants were entitled to admission to the United States.

5. A rule of liberal interpretation to carry out the intent rather than the naked letter of Congressional enactment has repeatedly been shown as to the general immigration acts. Without elaboration we refer to

Church of the Holy Trinity vs. *United States*, 143 U. S., 457, wherein the court held that it was unreasonable to suppose, considering the object of the Contract Labor Law, that a minister was to be held excluded.

United States vs. *Gay,* 95 Fed., 226, the Circuit Court of Appeals holding a window dresser imported under contract was not a contract laborer.

Scharrenberg vs. *Dollar Steamship Co.,* 229 Fed., 970, affirmed by the Supreme Court, 245 U. S., 122, holding a seaman engaged in foreign trade was not a contract laborer.

Tatsukichi Kuwabara vs. *United States,* 260 Fed., 104, holding that a Japanese teacher was not a contract laborer.

United States vs. *Union Bank of Canada,* and *United States* vs. *Royal Dutch West India Mail Co.,* 262 Fed., 91, adding into the meaning of the law a bank bookkeeper and a steamship office clerk.

Ex parte Aird, 276 Fed., 954, holding draftsman as a marine engineer was admissible, and not a contract laborer.

Ex parte Gouthro, 296 Fed., 506, holding a telegraph operator not within the Congressional meaning as a contract laborer.

After this enumeration of specific cases, let us cite the broad rule laid down by this court in *United States* vs. *Kirby,* 7 Wall, 482, 486:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended excep-

tions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

Interpretation of Section 25.

It is, of course, a well known principle of statutory construction that in the presence of contradictory or dubious expressions of the legislative will, an effort shall be made to harmonize and give effect to all provisions of the law. With this in mind let us look at Section 25 of the Immigration Act of 1924:

> "The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

If we say that this Act is in addition to, and not in substitution for, existing immigration provisions and add, as the Act does, that "other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act," and give these expressions their proper and natural emphasis, we may arrive at a solution of the difficulty

arising later in the section, because of the direction of the second clause of its second sentence—"an alien although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

No intent is shown in this Act itself, or in the reports accompanying it, to abolish the Chinese immigration laws, and as we see by this section, the Act is expressly declared not to be in substitution for such laws. Furthermore, the Immigration Act of 1917, with its clause in relation thereto (Section 38) expressly recognized the Chinese exclusion laws and continued their existence.

All of the Act, we say, must be given, if possible, meaning and effect, and if it be considered that the "addition" it gives to the immigration laws as to aliens incapable of naturalization in Section 13 refers to Asiatics other than Chinese—the laws as to the latter of whom are subjected to no substitution—then there is a new class to whom the workings of the Act may at this point be considered as dedicated, that is to say, all aliens incapable of naturalization except those who are expressly provided for by the laws governing the immigration of Chinese or coming from the limits of the Asiatic barred zone. This interpretation would accord with the facts of the situation, particularly the new and pressing form of the Asiatic problem and the intent of the committee to meet it. This general

view, furthermore, would permit the English traveler for business or pleasure to enter with his family irrespective of any question as to quota, for he would receive the benefit of the Gue Lim decision, of which the Department would logically be compelled to deprive him if the wives of Chinese merchants were rejected.

The foregoing argument would give to the second sentence of Section 25 all the force to which it is entitled.

Section 13 would be allowed its full force, but not interpreted as a substitute for, or a repeal of, the Chinese immigration laws. Section 14 as to deportation and exclusion and as to maintenance of exempt status would be effective and could be carried out.

Furthermore, the Asiatic barred zone provided for by the Immigration Act of 1917 would remain in force, and between the Chinese Exclusion Acts, the barred zone provision and the provisions of the Act of 1924 as to remaining Asiatics, all persons ineligible to naturalization and barred out, save for treaty provisions or other special exceptions, would be provided against.

The Effect of Clause (6) in Section 3 Relative to Admission of Aliens to Carry on Trade.

Section 3 provides:

> "When used in this Act the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except * * * (2) an alien visiting the United States temporarily for business or pleasure * * * and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance to the provisions of a present existing treaty of Commerce and Navigation."

It seems to be the view of the government, as shown by what has happened in this case, that the Chinese Exclusion Acts are in effect superseded by the Immigration Act of 1924 and that the only aliens entitled to enter the United States, as far as this discussion is concerned, are those who come solely to carry on trade under the treaty and that as to these latter, their wives and minor children may not be admitted because this particular clause is not referred to later; only clause (d) in section 4 being mentioned; such clause (d) referring to ministers, professors and their wives and unmarried children.

It will be borne in mind that clause (6) in Section 3 was not originally in the Act, but was put in at the suggestion of Secretary Hughes and that the insertion was not completed in Section 13 as it should have been to carry out in the most meticulous detail the proper intent of the framers of the Act.

While we discuss this condition it is not, from our point of view, at all essential to our argument. Nevertheless, a situation arises hereunder which proves to our minds that the government interpretation is untenable.

We need not repeat the argument that under the Chinese Exclusion Acts without any especial mention of them, the wives and minor children of merchants have been found admissible, and precisely as that was done under the sanction of the Supreme Court, we have a right to argue that an alien entering this country to carry on trade is entitled under all circumstances to bring with him his wife and minor children —in other words, that Section 3 should, ~~if it were applicable~~, be interpreted in favor of the wife and children precisely as the Chinese immigration laws have been interpreted for more than twenty years. Applying this interpretation and assuming argumentatively, as we have a right to argue, if the clause is interpreted precisely as the old laws were interpreted, a wife and children have the right to admission.

But to accept the interpretation the Department of Labor gives to this section leads to a social and legal absurdity, for it will be noted that by its terms an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, is a non-immigrant and entitled to come in irrespective of any question of quota. By the departmental interpretation, a wife or child of such a traveler would be com-

pelled to be regarded as a quota immigrant, or she or it would be treated under Section 5 as an immigrant who is not a non-quota immigrant. Let us assume, therefore, that the quota of England has been exhausted when an Englishman visiting the United States with his family arrived in New York. If an alien entitled to enter the United States to carry on trade under clause (6) may not bring with him his wife and minor children, then under the circumstances indicated, a tourist, the quota of his country being exhausted, may not bring with him his wife and children. No possible distinction can be made in the interpretation of the two clauses. The exclusion, therefore, of the wife and children demanded in this case would mean that the wife and children of the tourist or business man coming from England, the quota being exhausted, must be stopped and turned back at the port of entry. The Quota Act of 1921, as amended in 1922, would not admit the Englishman's family, for as to travelers on business or pleasure no mention is made of wives or children. Again the Immigration Act of 1924 is silent on the subject. In practical application no doubt has been expressed on this point as to the Englishman's family, nor should any doubt be now expressed under like circumstances as to either English or Chinese merchants or their families. Let us suppose that the wealthiest man in China desiring to enter the United States with his family for self-instruction should present himself at the Port of San

Francisco as a visitor for pleasure or as a tourist, he might be admitted by the Department as a visitor under clause (2) of Section 3, but there being no such quota in his case as might sometime help the Englishman, the family would be refused admission. Could such an interpretation contribute to the amenities which should prevail between nations? But is it not inescapable if the department be right as to clause (6)?

Not alone would this interpretation be inconsistent with the interpretation heretofore given with regard to merchants' wives and children, but it would go much further and render invalid the coming into this country in times past of even the wives and children of the Chinese ministers to the United States. In this connection we call the court's attention to the fact that the Act of 1882, as amended and added to by the Act of July 5, 1884, touching the immigration of Chinese said, in Section 13, that it should not apply to diplomatic or other officers of the Chinese, or other governments, traveling upon the business of their government "whose credentials should be taken as equivalent to the certificate in this Act mentioned, and should exempt them and their body and household servants from the provisions of this Act as to other Chinese persons."

Section 7 of the Act of September 13, 1888, gives a general right of admission only to "Chinese diplo-

matic or consular officers and their attendants," not to wives and children, and this law is now in existence.

Even the Treaty of 1894, referring to

> "The right at present enjoyed by Chinese subjects, being officers, teachers, students, merchants, or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein,"

never in express terms extended such right to their wives or children; nevertheless they came in without question.

To give, therefore, the interpretation to this Act demanded by the Department of Labor, we must confess that the Supreme Court was wrong in its Gue Lim decision so frequently cited with approval, that the Department of Labor was wrong in admitting the wives of Chinese officials and travelers, and that under the circumstances stated it would be wrong to admit the wives and children of Englishmen or Frenchmen coming to this country or of a wealthy Chinese traveler seeking self-instruction, and we insist upon this, notwithstanding the language of Section 5, as follows:

> "When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so

specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

It is manifest that if the Chinese merchant's wife is not to be admitted because of the provision against admission through relationship in Section 5, so also the wife of the English traveler must stay out, unless she be admitted under the quota. She has no express non-quota provision to help her.

What Was the Effect of the Immigration Act of 1924 on the Chinese Immigration Laws?

It will be remembered that the Act of 1917 provided in Section 38:

"That this Act shall not be construed to repeal, alter, or amend, existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section nineteen hereof." (Section 19 refers to matters not involved in this case.)

Also that the Act of 1921-1922 provides in Section 2 as follows:

"* * * This provision shall not apply to the following, and they shall not be counted in reckoning any of the percentage limits provided in this Act: * * * (5) aliens from countries immigration from which is regulated in accordance with treaties or agreements relating solely to immigration;" * * *

There being nothing of material character in the Acts of 1917, 1921 and 1922 directly planned to affect the Chinese, it is evident, therefore, that at the time of the enactment of the Immigration Act of 1924, the Chinese Immigration Laws were in full force and effect, and the question arises as to whether they can be treated as abrogated by anything contained in the latter Act. When Congress was afforded the opportunity to set them aside altogether, particularly when it came to define the term, "Immigration Laws," in paragraph (g) of Section 38, it described as including "such Act (the Immigration Act of 1917), this Act and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, and expulsion of aliens." We should not now forget that the Act of 1917 expressly continued the Chinese Exclusion Act.

It is true, as we have pointed out, that in Section 25 of the Act of 1924 it is said that:

> "An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act."

It is also true that, under paragraph (c) of Section 13 no alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admis-

sible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of Section 4, or (2) is an unmarried child under eighteen years of an immigrant admissible under such subdivision (d) and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3. It will be recalled that these clauses are left as reported in the original bill before the provision relative to traders was inserted as clause (6) in section 3, and by apparent inadvertence no express addition was made to Section 4. We are, therefore, by the government's contention, left in the position of admitting alien wives (ineligible to citizenship) of ministers (perhaps of the Buddhist religion) and professors with their wives and not wives of merchants. Assuredly, Congress had no such intent.

To give these sections the effect sought for by the government would be to repeal by implication the whole body of Chinese immigration laws recognized as in existence by Section 38 of the Act of 1917 and also recognized by paragraph (g) of Section 38, above quoted. Merchants' wives and minor children would not be provided for as under prior legislation. Provisions as to return of laborers would be defeated or limited by the provisions of the new Act.

We have to submit, therefore, that repeals by implication not being favored in the law, no intendment to support them should be indulged in in the absence of clear statutory direction.

Touching the question of repeals by implication which are never favored, we refer without particular elaboration to a few cases:

"The implication of a repeal of one ordinance by another * * * is never favored."

Mitchell vs. *Dakota Central Tel. Co.*, 246 U. S. 396.

"The amendments of Espionage Act of June 15, 1917 (40 Stat. L., 217, Chap. 30; Compiled Statutes, Sec. 10212A), did not invalidate a prosecution for acts committed before the amendment."

Frohwerk vs. *U. S.*, 249 U. S., 204; 63 Law Ed., 561.

"An important public statute of long standing will not be held to be repealed except by express words or by strong and necessary implication."

Wilson vs. *Spencer*, 1 Rand., 76; 10 Am. Decisions, 491.

Treaty Rights and Statutory Recognition Thereof

Without attempting to reiterate much that has been said before we desire, in conclusion, briefly to call attention to the fact that steps to begin treaty relations with China find expression in the Act of March, 1843, c. 90 (5 Stat. 624), wherein provision was made to enable the President to establish future commercial relations between the two countries *"on terms of national equal reciprocity."* The original treaty which

followed was that of 1844, and the supplemental or additional stipulations or articles embraced in the treaties of 1858, 1868 and 1880 were but supplemental and additional articles thereto, excepting for the sole modification as to Chinese coming to this country as laborers contained in the last mentioned treaty. The treaty which followed, that of 1894, has since been denounced by the Chinese Government. The last treaty, that of 1903, was simply a reaffirmation of the then existing treaties. The method and manner in which these treaties are to be considered is simply that the different treaty stipulations make one composite and completed treaty. President Hayes, upon this subject, and with respect to the first three of these groups of treaty stipulations, states as follows (6, Messages of Presidents, 4466):

> "* * * Upon the settled rules of interpretation applicable to such supplemental negotiations the text of the principal treaty and of these 'additional articles thereto' constitute one treaty from the conclusion of the new negotiations, in all parts of equal and concurrent force and obligation between the two governments, and to all intents and purposes as if embraced in one instrument."

This view has been, in effect, upheld by Mr. Justice Field when sitting on the circuit in the celebrated case of *"The Chinese Merchant In re Low Yam Chow"* (13 Fed., 605, 608):

> "* * *"
>
> "The Act of May 6, 1882, was framed in supposed conformity with the provisions of this sup-

plementary treaty. In the inhibitions which it imposes upon the immigration of Chinese there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty. And we will not assume, in the absence of plain language to the contrary, that Congress intended to disregard the obligations of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880. This latter treaty only authorizes suspensive or restrictive legislation with respect to the importation of Chinese laborers. It provides, in express terms, as seen above, that the limitation or suspension shall apply only to them, *'other classes not being included in the limitations.'*"

This view was concurred in and approved by the Court of Appeals for the Ninth Circuit, the opinion being written by Circuit Judge McKenna, who afterwards succeeded to the Supreme Bench, in the case of *Lee Kan* vs. *United States* (62 Fed., 914). This holding was also quoted with approval by this Court in the case of *Lau Ow Bew* (144 U. S., 59).

These decisions are all to the effect that the provisions of the Burlingame Treaty, except as to the coming of Chinese laborers, are still in full force and effect. This Court in the case of *United States* vs. *Gue Lim* (176 U. S., 459) upheld the right of a merchant's wife and minor children to enter the United States as a treaty right, and that they were not to be denied admission under the provisions of a subsequent statutory enactment, whose sole purpose was avowedly to execute these treaty stipulations. It was not deemed necessary in that case, in support of the

plea of Chinese wives and minor children, to go back of the stipulations in the treaty of 1880, and it may not be necessary in the present controversy, but to meet the contingency if it should be necessary, we have herein specified the earlier treaty stipulations wherein the right *"to reside with their families and trade there"* is reciprocally given to merchants traveling or visiting in this country, and we submit that this right lacks none of its vitality through having been given *reciprocally* instead of by *reiteration.* These different treaty articles formed one composite and completed treaty, and as said by President Hayes are *"in all parts of equal and concurrent force and obligation between the two governments, and to all intents and purposes as if embraced in one instrument."*

Upon the subject of the interpretation of treaties the rule as later reaffirmed and announced by this Court in *Asakura* vs. *City of Seattle* (265 U. S., 332; 44 Sup. Ct., 515), said, through Mr. Justice Butler, as follows

> "* * * Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. * * *."

Statute Upholds Treaty

The Immigration Act of 1924 professes to recognize and uphold treaty rights, all as more elaborately set forth earlier in this brief. We concede that a statute may abrogate the provisions of a prior treaty, as upheld by this Court in *Chae Chan Ping* vs. *United States* (130 U. S., 581; 9 Sup. Ct., 623); but we contend that a statute which professes to recognize a treaty, or execute the treaty stipulations, should not be interpreted to abrogate treaty rights which it professes to recognize and place into effect, *Chew Heong* vs. *United States* (112 U. S., 536; 5 Sup. Ct., 255). We therefore contend that the present act should not be interpreted in a manner destructive of the very object which it claims to recognize and uphold. In the *Chew Heong* case this Court, speaking through Mr. Justice Harlan, said:

> "* * * For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty. The utmost that could be said, in the case supposed, would be that there was an apparent conflict between the mere words of the statute and the treaty, and that by implication the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure.

But even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. *Ex parte Yerger,* 8 Wall., 105. In *Wood* vs. *U. S.,* 16 Pet., 362, Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say, by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto,* to the extent of the repugnancy.' In *State* vs. *Stoll,* 17 Wall., 430, the language of the court was that 'it must appear that the latter provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be.' See also *Ex parte Crow Dog,* 109 U. S., 570; S. C. 3 Sup. Ct. Rep., 396; *Arthur* vs. *Homer,* 96 U. S., 140; *Harford* vs. *U. S.,* 8 Cranch, 109.

"When the act of 1882 was passed Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so

declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. * * *."

The Immigration Act of 1924, in Section 3, Subdivision 6, recognizes the right of aliens to come solely for purposes of trade under the provisions of existing treaties of commerce and navigation. Obviously the measure of the rights of the different traders is to be determined by the treaties of the nations to which they belong. That nationals of one country may be accorded more or less than the nationals of another is to be determined by their existing treaties. This act maintains the Immigration Act of 1917 as the basic law upon that subject and is, as we have earlier herein contended, to be considered in *pari materia* with it. This view, as to the relation of the Immigration Act of 1917 to the first quota act of 1921-1922, has been sustained by this Court in the recent case of *Commissioner etc.* vs. *Gottlieb* (265 U. S., 310; 44 Sup. Ct., 528), wherein, speaking through Mr. Justice Sutherland, the Court held:

"* * *.

"The lower court was right in holding that the acts are in *pari materia,* and that Section 3 of the earlier act is still fully operative, and may be considered as though it formed a part of the later act.

> "* * * The contention that it is absurd and unreasonable to say that the wives and children of ministers from the barred Asiatic zone are to be admitted and those outside of it denied admission, does not require consideration, since the result we have stated necessarily follows from the plain words of the law, for which we are not at liberty to substitute a rule based upon other notions of policy or justice. That aliens from one part of the world shall be admitted according to their status, and those from another part according to fixed numerical proportions, is a matter wholly within the discretion of the lawmaking body, with which the courts have no authority to interfere."

Under this Court's interpretation Section 38 of the Immigration Act of 1917, wherein it is

> "Provided, That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section 19 hereof * * *,"

is still fully operative and may be considered as though it formed a part of the present Immigration Act of 1924. The rights of the Chinese, as contended in these different Chinese Exclusion Acts, are all based upon and profess to be but interpretative of the treaty rights of the Chinese. As the Immigration Act of 1924 professedly recognizes and upholds the treaty rights in question, it is apparent, we respectfully submit, that any interpretation of this act which would deny treaty and statutory rights which it professes to recognize and uphold must be avoided as repellant

to the national consciousness of honor, integrity and fair dealing, all as differently stated by the late President Roosevelt in the following words: "* * * *we can not expect to receive equity unless we do equity. We can not ask the Chinese to do to us what we are unwilling to do to them."*

Neither Section 5, nor Section 25, profess to violate, or transgress, or encroach upon, treaty rights. Section 5 states:

> "* * * An alien who is not particularly specified in this act as a * * * non-immigrant shall not be admitted as a * * * non-immigrant because of relationship to any individual who is so specified."

But if the wives and children are particularly specified as entitled to come in the treaty, even though that specification be given *reciprocally* instead of by *reiteration,* then they are exempt from the debarring provision of Section 5, because they would be themselves particularly specified as in the act intended, and hence be non-immigrants and exempt from the debarring provision of Section 13, Subdivision (c) of the Immigration Act of 1924, which is ineligible to citizenship ban. Judge Neterer, in *Ex parte Goon Dip,* 1 F. (2d) 811, 813, 814, held as follows:

> "Section 25, Immigration Law 1924, provides: 'The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws. * * * An alien, although admissible

under the provisions of this act, shall not be admitted * * * if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act.'

" 'Immigration laws' are defined in Section 28 (g), Act, *supra,* to mean 'all laws, conventions, and treaties * * * relating to the immigration, exclusion, or expulsion of aliens.' Reference to such laws is made in the margin.

"An immigrant is 'an alien' departing from any place outside the United States destined for the United States, * * * except '* * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' The wives and minor children are clearly not immigrants under Subdivision (6), Section 3, *supra.*

" 'No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * (3) is not an immigrant as defined in section 3. Subdivision (3), Section 13, Act, *supra.* The courts have for more than a generation construed article 2 of the treaty, *supra,* to read: 'Chinese * * * merchants * * * together with their body and household servants, wives and minor children, shall be allowed to go and come * * *.'

"(3) The report of the committee and the express provisions of the act clearly show the intent of the Congress not to disturb the relations existing under the prior law and treaty. I think that this act and the treaty and 'immigration law' and prior judicial construction of the treaties and law and departmental construction must all be considered together, and under such consideration the court will be slow to assume that Congress intended to

treat the treaty stipulations as a 'scrap of paper.' *Chew Heong* vs. *U. S.*, 112 U. S., 536; 5 S. Ct., 255; 28 L. Ed., 770; *U. S.* vs. *Mrs. Gue Lim, supra.* Hence I think these aliens were denied a fair hearing.

"The writ will issue, returnable October 1. This will give opportunity to the board of special inquiry to further examine the aliens and determine their physical and mental fitness under the Immigration Law, and relationship to the respective resident alien merchants."

Since it has been conclusively shown that the avowed intention of Congress in the supplemental addition of Subdivision 6 to Section 3, was to protect treaty rights that would otherwise have been infringed upon, and it being unmistakably shown that the Chinese Exclusion Laws are not to be deemed altered, repealed or amended by this Immigration Act of 1924 there can appear no good reason why the congressional intention so manifested should be given other than its full recognition, and so considered, we have to submit that the question certified should be answered in the negative, that is to say, that the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1, 1924, such wives and minor children now applying for admission, are not mandatorily excluded from the United States under the provisions of the Immigration Act of 1924.

SUMMARY

We may now marshal the salient points we have set up in the foregoing:

1. In considering and passing the Act of 1924, Congress had no design to touch the Chinese Immigration Acts, its attention being directed primarily to the question of a reduced quota, the correction of hardships in the administration of the old law, and the exclusion of the Japanese or Asiatics other than Chinese.

2. Congress acted in full knowledge of the fact that in the past that the courts had treated the families of merchants as belonging to the mercantile class as fully as the heads of the household.

3. As affecting human rights the courts had always taken a broad humanitarian view of the Immigration laws seeking even in the teeth of doubtful or apparently hostile language the true intent of Congress.

4. The only consistent interpretation of Section 25 of the Act of 1924 shows that the Act was in addition to and not in substitution for the older immigration laws, and so treated the Chinese Immigration laws could be sustained in their entirety and the Act given its full operation in a field not theretofore covered, that is, as against Asiatics other than Chinese who were already taken care of by other laws.

5. If we literally interpret the Act as insisted on

by the Department of Labor, an English traveler for pleasure may not be accompanied by his wife and children unless they come within quota limitations.

6. The government is in the position of claiming repeal by implication of the Chinese Immigration laws, and repeals by implication are never favored in law.

Respectfully submitted,

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